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SUPREME COURT OF THE UNITED STATES.

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JOSEPH ANDREWS, PL'FF IN ERROR,

vs.

CHARLES A. HENSLER.

IN ERROR TO THE CIRCUIT COURT U. S. FOR THE EASTERN DISTRICT OF LOUISIANA.

G. S. GIDEON, Printer, 511 Ninth street, Washington, D. C.

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Gideon, Print.

**Circuit Court of the United States, fifth circuit, and Eastern district of Louisiana.**

**Transcript.**

JOSEPH ANDREWS vs. CHARLES A. HENSLER. } No. 3,149.

*Petition.*—Filed July 29th, 1859.

To the Honorable the Judges of the Circuit Court of the United States, for the fifth circuit, and holding sessions in the Eastern district of Louisiana:

The petition of Joseph Andrews, a citizen of the State of Mississippi, and residing in Yazoo county therein, respectfully shows:

That on the 29th day of March, 1859, petitioner purchased from Charles A. Hensler, (by public act before J. W. Breedlove, a notary public of New Orleans,) a citizen of the State of Louisiana, and residing in the city of New Orleans, in this district, the following named slaves for life, to wit: Moses, aged about fifty years; Hammond, aged about 27 years; Peter, aged about 23 years; and Leah, aged 14 years—all fully guaranteed against the vices and maladies prescribed by law—for and in consideration of the sum of forty-five hundred dollars, in payment of which petitioner gave his draft for the like amount to the order of, and endorsed by himself on, and accepted by, A. Miltenberger and Borron, of the city of New Orleans, dated on the 29th March, 1859, and made payable twelve months after date, with interest thereon from date, until maturity, at the rate of eight per cent. per annum.

Your petitioner alleges, that at the time of the said sale, to wit, 29 March, 1859, the said slaves were, all of them, afflicted with various redhibitory maladies, defects, or vices unknown to your petitioner:

That the aforesaid slave Peter was then afflicted with pneumonia, a malady, and that since the sale he has died of typhoid pneumonia, the disease which he had at the time of said sale:

That Hammond, another of said slaves, was also afflicted at the time of the sale aforesaid, with the same malady, to wit, pneumonia and with chronic diarrhea, and that since said sale he has died of the malady aforesaid, typhoid pneumonia and of chronic diarrhea:

That Leah, another of said slaves, had at the time of said sale typhoid pneumonia, chronic diarrhea, and dropsy, with which maladies she is now afflicted to such extent as to render her services absolutely useless, or very imperfect:

That Moses, another of said slaves, was at the time of said sale afflicted with chronic diarrhea to such extent as to have produced

a continued general debility, that has rendered his services to this time absolutely useless, or very imperfect.

Your petitioner alleges, that all the vices, defects, or maladies aforesaid, of which the said slaves were thus afflicted at the time of the sale, were of such a grave character as to have rendered said slaves absolutely useless, or their use so inconvenient and imperfect, that your petitioner would not have purchased them had he known of said vices, defects, or maladies.

He further alleges, that since the sale aforesaid, he has tendered to said Charles A. Hensler all of the above named slaves, and demanded the return of the draft aforesaid, and the avoidance of said sale, in consequence of the redhibitory defects aforesaid, but that said Hensler has refused to receive the said slaves, to annul and cancel said sale, or to return to petitioner the aforesaid draft, and to pay him his costs, charges, and damages.

Wherefore, the premises considered, petitioner brings this his suit, and prays that the said Charles A. Hensler, who he alleges is a citizen of the State of Louisiana, and resides within the eastern district of Louisiana, may be duly cited to answer this petition, and that after due proceedings that said sale be annulled, and that he may be condemned to return the draft aforesaid; or if then paid at its maturity, that he be condemned to pay to petitioner the aforesaid sum of forty-five hundred dollars, with interest of eight per centum per annum, from the 29th of March, 1859, until paid; and further, that said Hensler be condemned to pay the further sum of one thousand dollars, for the damages, costs, and charges for the care and medical treatment that petitioner has incurred in consequence of the said sale, and the false and fraudulent representations made by said Hensler to petitioner.

Petitioner alleges, that at the time of the said sale, all the vices, maladies, and defects aforesaid, were well known to said Hensler.

Petitioner alleges, that he is a citizen of the State of Mississippi, and prays that this cause may be tried by a jury, and for such other and further relief as to law and equity may appertain. And will ever pray, &c.

(Signed) DUNCAN N. HENNEN,
*Attorney of Petitioner.*

(Endorsed on the foregoing):

We, the jury, find verdict for the defendant.
New Orleans, 9th Dec'r, 1859.

(Signed) E. L. TRACY, *Foreman.*

*Answer.*—Filed Nov'r 9th, 1859.

In U. S. Circuit Court, Eastern dist. of Louisiana.

JOSEPH ANDREWS
vs.
CHARLES A. HENSLER.

And now, by leave of the court, comes Charles A. Hensler, a resident of the city of New Orleans, and for answer to the petition of plaintiff in this cause, denies all the allegations thereof, and prays judgment in his favor, and for costs and general relief.

(Signed) H. M. SPOFFORD,
*For C. A. Hensler.*

*Amended Answer.*—Filed 13 March, 1860.

In U. S. Circuit Court, New Orleans.

JOSEPH ANDREWS
vs.
CHARLES A. HENSLER.

And now comes the defendant, and leave of the court being first obtained, filed this his amended answer to the petition of the plaintiff:

He avers, that he requested N. Vignie, the auctioneer, who sold the slaves in question, to declare from the stand that the said slaves would have to be examined prior to their delivery, by the physician of the purchaser, and that said Vignie did so declare in a loud voice from the stand, at the time the plaintiff bought the slaves mentioned in his petition.

But respondent avers, that the plaintiff was in such haste to get the slaves purchased by him away, that he, through his agents, Ar. Miltenberger & Borron, sent a request to respondent, to have them put on board the steamer Gen. Jackson, on the 29 March, 1859, before any act of sale was passed, and hurried them off without any examination, and without complying with the terms and conditions of sale, and that if any loss has occurred, it has been through his own negligence, and violation of the terms of sale, and imprudent conduct, for which this respondent is not answerable. Wherefore, he prays as in his original answer, &c., &c.

H. M. SPOFFORD, *of Counsel.*

Endorsed: Let this be filed.

THEO. H. McCALEB, *U. S. Judge.*

*Marshal's Return.*

Rec'd March 14th, 1860, and on the same day served a copy of the within on Mr. D. N. Hennen, att'y, at his residence in this city.

Returned March 15th, 1860.

CHAS. CATOIR, *Dy. U. S. M.*

*Trial of Cause.—Minutes.*

November Term, 1859.

New Orleans, Friday, 9th December, 1859.—Court met pursuant to adjournment. Present, Hon. Theo. H. McCaleb, district judge; absent, Hon. J. A. Campbell, presiding judge.

JOSEPH ANDREWS
vs.
CHAS. A. HENSLER. } 3,149.

This cause came on to be heard, D. N. Hennen, esq., appearing for the plff., and H. M. Spofford, esq., for the defendant. The following jury was sworn and empanelled to try the same, viz: E. L. Tracy, E. C. Payne, W. C. Tompkins, S. M. Todd, S. C. Mitchell, J. W. Gale, J. M. Gould, W. L. Driver, E. R. Poole, James Medd, and R. McMaster, and it appearing that no other jurors were in attendance on the court, it was agreed by the parties that the cause be tried before the eleven sworn. Whereupon, after hearing evidence and charge of the court, L. E. Tracy, esq., was appointed foreman of the jury, and they returned from their seats the following verdict: "We, the jury, find verdict for the defendant. New Orleans, 9th December, 1859. E. L. Tracy, foreman." Ordered that the verdict be recorded.

*Judgment.—Minutes.*

November Term, 1859.

New Orleans, Saturday, 10th December, 1859.—Court met pursuant to adjournment. Present, Hon. Theo. H. McCaleb, district judge; absent, Hon. J. A. Campbell, presiding judge.

JOSEPH ANDREWS
vs.
CHARLES A. HENSLER. } 3,149.

By reason of the verdict herein rendered, and in conformity thereto, it is now ordered, adjudged, and decreed, that there be judgment in favor of the defendant, and that the plaintiff's petition be dismissed with costs.

*Motion for New Trial.*

November Term, 1859.

New Orleans, Tuesday, 13th Dec'br, 1859.—Court met pursuant to adjournment. Present, Hon. Theo. H. McCaleb, district judge; absent, Hon. J. A. Campbell, presiding judge.

JOSEPH ANDREWS
vs.
CHAS. A. HENSLER. } 3,149.

On motion of D. N. Hennen, esq., of counsel for plaintiff, ordered that defendant show cause on Saturday, the 17th inst., at 10 o'clock a. m., why a new trial should not be granted in this case on the following grounds:

1st. That the court erred in its instructions to the jury, and in excluding the testimony of James Borron and the documents A and B annexed to bill of exceptions.

2d. That the verdict and judgment is contrary to law and evidence.

*Submission of Motion for New Trial.*

November Term, 1859.

New Orleans, Tuesday, 10th January, 1860.—Court met pursuant to adjournment. Present, Hon. Theo. H. McCaleb, district judge; absent, Hon. J. A. Campbell, presiding judge.

JOSEPH ANDREWS vs. CHAS. A. HENSLER. } 3,149.

The application herein made by the pl'ff for a new trial came on to be heard, and was argued by counsel and submitted to the court.

*Opinion on Motion for New Trial.*—Filed 16th January, 1860.

U. S. Circuit Court.

J. ANDREWS vs. CHAS. A. HENSLER. }

After an attentive examination of the grounds upon which the counsel for the plaintiff has urged his application for a new trial, I am unable to discover any error in the ruling of the court rejecting the evidence. For the course he subsequently pursued in putting the case before the jury, and asking for a verdict, the counsel is himself responsible. He now acknowledges that it did not then occur to him that two of the negroes, which were the subject of the suit, had died before the institution of the suit, and that, therefore, it was not necessary to make a tender of them in order to put the defendant in mora; and he contends that, with the evidence before them, the verdict of the jury ought not to have been entirely for the defendant. The court will not, at this stage of the proceedings, decide how far the evidence introduced by the plaintiff established his right to recover the price of the two dead negroes; but looking rather to the right of the party to be fully and fairly heard, than to any omission or oversight of his counsel, it is of the opinion that a new trial should be granted, in order that the whole merits of the controversy may be more fully presented to the court and jury. The delay and expense necessarily incident to an appeal in all cases, make it incumbent upon this court to afford to parties every reasonable opportunity to obtain a full and fair hearing, and the presence of the presiding judge at the next term will render a second trial of this cause more satisfactory to both parties concerned.

A new trial is granted.

*Judgment on rule for new trial.*

November Term, 1859.

New Orleans, Monday, 16 January, 1860.—Court met pursuant to adjournment. Present, Hon. Theo. H. McCaleb, district judge; absent, Hon. J. A. Campbell, presiding judge.

JOS. ANDREWS
vs. } 3,149.
CHAS. A. HENSLER.

The court having duly considered the application herein made for a new trial, this day delivered its opinion in writing, and in conformity thereto doth now order that the verdict and judgment herein rendered be set aside, and that a new trial be granted.

*Trial and Verdict.*

April Term, 1860.

New Orleans, Tuesday, 5th June, 1860.—Court met pursuant to adjournment. Present, Hon. J. A. Campbell, presiding judge; Hon. Theo. H. McCaleb, district judge.

JOSEPH ANDREWS
vs. } 3,149.
CHAS. A. HENSLER.

This cause was called for trial; D. N. Hennen, esq., appearing for plaintiff, and H. M. Spofford, for the defendant.

The following jury were sworn and empanelled to try the same: Jno. J. Adams, W. Ellis, R. B. Sumner, H. M. Wright, Jno. King, Ed. Claren, C. H. Bradshaw, A. W. Bosworth, Thos. F. Patton, J. A. Haggerty, J. H. Howland, B. W. Huntington.

Whereupon, after argument of counsel and charge from the court, R. B. Sumner was appointed foreman of the jury, and they retired to deliberate, and shortly thereafter returned the following:

"New Orleans, 5th June, 1860.—We, the jury, find a verdict for the plaintiff for the sum of seventeen hundred and fifty dollars, with interest at the rate of eight per cent. per annum from the 29th March, 1859. The negroes Moses and Leah to remain the property of the plaintiff. R. B. Sumner, foreman."

*Discontinuance of Claim for Damages.*

April Term, 1860.

New Orleans, Wednesday, 6th June, 1860.—Court met pursuant to adjournment. Present, Hon. J. A. Campbell, presiding judge; Hon. Theo. H. McCaleb, district judge.

JOSEPH ANDREWS
vs. } 3,149.
CHAS. A. HENSLER.

On motion of D. N. Hennen, esq., of counsel for the plaintiff,

and on his suggesting to the court that on the trial of this cause on yesterday, and before the same was submitted to the jury, he did, with leave of the court, enter a discontinuance upon his claim for damages, and that the clerk has omitted to enter the same of record, it is ordered that the same be now entered nunc pro tunc.

*Plaintiff's 1st Bill of Exceptions.*—Filed 14 June, 1860.

Circuit Court U. S., East. dist. of La.

JOSEPH ANDREWS
vs.
CHAS. A. HENSLER.

Be it remembered, that on the trial of this cause on this 5th day of June, 1860, before the court and jury, the plaintiff's counsel moved the court to instruct the jury that, by the pleadings, the defendant has admitted, by his amended answer, his liability to repay the price ($4,500) of the slaves sold, upon the ground stated in plaintiff's petition, to wit: the existence of redhibitory defects therein charged, and relies solely upon a discharge from said liability, in consequence of the neglect of, and violation of, the terms of sale by plaintiff, and that this whole controversy is now reduced to the simple point, has the plaintiff discharged defendant in the manner and form claimed by him in his amended answer, and that the special defence therein set forth is to be considered as a waiver of the general issue, which charge the court refused to give; to which refusal of the court the plaintiff, by his counsel, excepted in open court upon the trial, and while the jury were at the bar, on the ground that said amended answer was a special defence, amounting in law to a waiver of the general issue, and inconsistent therewith; and thereupon the plaintiff's counsel tendered this his bill of exceptions, which is allowed. Signed and sealed by the court in open court at the trial of the cause aforesaid, on this fifth day of June, in the year of our Lord eighteen hundred and sixty.

J. A. CAMPBELL, [SEAL.]
*Associate Justice of the Sup. Court of the U. S.*

*Plaintiff's 2d Bill of Exceptions.*—Filed 14 June, 1860.

Circuit Court U. S., East. dist. of La.

JOSEPH ANDREWS
vs.
CHARLES A. HENSLER.

Be it remembered, that on the trial of this cause, before the court and a jury, on this 5th day of June, 1860, the plaintiff's counsel requested the court to instruct the jury, that the tender of the slaves in controversy, if sufficiently proved by the evidence produced, was only necessary as a prerequisite to the rescission of the sale, referred to in plaintiff's petition, and in order to enable the

plaintiff to bring his suit in avoidance of said sale; and that what was required by law in reference to said tender was, that it should be made prior to the institution of the suit and its prescription by law; that provided said tender was made prior to the institution of the suit, and within the time prescribed by law for the institution of the suit, its being made tardily or promptly can have no effect to prejudice the right of plaintiff to recover in this action; that the fact, if so found by the jury from the evidence produced, that plaintiff had tendered Peter, one of the slaves, after his death, does not of itself prejudice plaintiff's right to recover his value; but that said tender after the death of Peter, one of the slaves, was unneccessary; which charge the court refused to make, but charged the jury that in order to a complete rescission of the contract, the tender should have been made in a reasonable time, and if the jury found that it was not made in a reasonable time, the plaintiff was only entitled to recover for the damages he had sustained by the slaves being defective, in the manner proved before them; and for the amount of such damages, he was entitled to recover in this form of action; to which refusal to charge, and charge of the court, the plaintiff's counsel excepted in open court upon the trial of the cause, and in the presence of the jury, while they were yet at the bar, upon the grounds that the tender required by law in this case is simply and solely a prerequisite to a suit for the rescission of the sale, and that if made prior to its institution and to the prescription of the suit by law, can have no other or such relation to the merits of the controversy, as is charged herein by the court; and thereupon, in open court, the plaintiff tendered this his bill of exceptions, which is allowed.

Signed and sealed by the court, in open court, at the trial of the cause aforesaid, on this fifth of June, in the year of our Lord eighteen hundred and sixty.

J. A. CAMPBELL, [SEAL.]
*Associate Justice of the Sup. Court of the U. S.*

*Judgment.*

Circuit Court of the United States, fifth circuit, and Eastern district of Louisiana.

April Term, 1860.

New Orleans, Wednesday, 6th June, 1860.—Court met pursuant to adjournment. Present, Hon. J. A. Campbell, presiding judge; Hon. Theo. H. McCaleb, district judge.

JOSEPH ANDREWS
vs.
CHARLES A. HENSLER. } 3,149.

By reason of the verdict of the jury herein, and in conformity there-

to, it is now ordered, adjudged, and decreed, that the plaintiff, Joseph Andrews, do have and recover judgment against the defendant, Charles A. Hensler, for the sum of seventeen hundred and fifty dollars, with interest thereon, at the rate of eight per cent. per annum, from the 29th March, 1859, until paid, and cost of suit; and further, it is ordered and decreed, that the negroes Moses and Leah remain the property of the plaintiff, Joseph Andrews.

Judgment rendered 6th June, 1860.

Judgment signed 14th June, 1860.

J. A. CAMPBELL,
*Asso. Justice S. C. U. S.*

*Petition and Order for Writ of Error.*—Filed 14th August, 1860.

To the Honorable the Circuit Court of the United States in and for the 5th judicial circuit and Eastern district of Louisiana:

The petition of Joseph Andrews, a citizen of the State of Mississippi, and plaintiff in a suit in this hon. court against Charles A. Hensler, respectfully shows: That he is aggrieved by a final judgment rendered therein in this hon. court on the 6th day of June, 1860, and is advised that there is error therein to his prejudice; wherefore he prays that a writ of error may be allowed to him, returnable according to law to the Supreme Court of the United States, upon his giving bond, with sufficient surety, in such amount as the court may direct.

And will ever pray, &c.

DUNCAN N. HENNEN,
*Att'y of Pet'r.*

*Order.*

Let a writ of error be allowed as prayed for on plaintiff's giving bond, with good and solvent security, in the penal sum of five hundred dollars, conditioned according to law.

THEO. H. McCALEB,
*U. S. Judge.*

*Bond for Writ of Error.*—Filed 18th September, 1860.

Know all men by these presents, that we, Joseph Andrews, as principal, by Aristide Miltenberger, his agent, and Aristide Miltenberger as surety, are held and firmly bound unto Charles A. Hensler in the full and just sum of five hundred dollars, to be paid to the said Charles A. Hensler, his certain attorney, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 18th day of September, in the year of our Lord one thousand eight hundred and sixty.

Whereas lately at a circuit court of the United States, 5th judicial circuit, holding sessions in and for the eastern district of Louisiana, at the city of New Orleans, in a suit depending in said circuit court, wherein Joseph Andrews is plaintiff, and Charles A. Hensler is defendant, judgment was rendered against the said plaintiff, Joseph Andrews, for a part of his claim, and the said Joseph Andrews having obtained a writ of error, and filed a copy thereof in the clerk's office of said circuit court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Charles A. Hensler citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, the 1st Monday of December next:

Now, the condition of the above obligation is such, that if the said Joseph Andrews shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

JOSEPH ANDREWS, [L. S.]
By his Agent,
AR. MILTENBERGER.
AR. MILTENBERGER. [L. S.]

Sealed and delivered in presence of—
DUNCAN N. HENNEN.

Approved.

THEO. H. McCALEB.
*U. S. Judge.*

Circuit Court of the United States, fifth circuit, and Eastern district of Louisiana.

CLERK'S OFFICE.

I certify that the foregoing 22 pages contain and form a full, complete, true and perfect transcript of the record and proceedings had in the case of Joseph Andrews vs. Charles A. Hensler, No. 3,149 of the docket.

Witness my hand, and the seal of the said court, at the city of New Orleans, this 22d day of October, 1860.
[SEAL.]
J. W. GURLEY, *Clerk.*

*Writ of Error.*

UNITED STATES OF AMERICA, *ss.*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States in and for the fifth circuit, and holding sessions for the Eastern district of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition

of the judgment of a plea which is in the said circuit court before you, or one of you, between Joseph Andrews and Charles A. Hensler, a manifest error hath happened, to the great damage of the said Joseph Andrews, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Roger B. Taney, Chief Justice of the said Supreme Court of the United States, this 1st Monday of Dec'r, 1859, in the year of our Lord one thousand eight hundred and fifty-nine.

Issued 18th Sept., 1860.

J. W. GURLEY,
*Clerk of the United States Circuit Court*
*for Eastern District of Louisiana.*

Filed 18 Sept., 1860.

J. W. GURLEY, *Clerk.*
By W. LAVISSON, *Dep. Cl'k.*

*Citation.*

THE UNITED STATES OF AMERICA,
*Eastern District of Louisiana.*

The President of the United States to Charles A. Hensler, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, wherein Joseph Andrews is plaintiff in error, and you are defendant, to show cause, if any there be, why the judgment rendered against the said pl'ff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, this 18th day of September, in the year of our Lord one thousand eight hundred and sixty.

THEO. H. McCALEB,
*U. S. Judge.*

*Marshal's Return.*

Received September 19th, 1860; and on the 22d day of October, 1860, served a copy of the within on Mr. Charles A. Hensler, personally, at his office, in this city.

Returned October 22d, 1860.

CHAS. CATOIR, *D. M.*

Filed 26th November, 1860.

# Supreme Court of the United States.

DECEMBER TERM, 1860.

JOSEPH ANDREWS, Plaintiff in Error,

*vs.*

CHARLES A. HENSLER, Defendant in Error.

**BRIEF OF PLAINTIFF'S COUNSEL.**

# Supreme Court of the United States.

DECEMBER TERM, 1860.

JOSEPH ANDREWS, PLAINTIFF IN ERROR,

*vs.*

CHARLES A. HENSLER, DEFENDANT IN ERROR.

This is a redhibitory action.

It is thus defined by the Civil Code of Louisiana :

Art. 2496. "Redhibition is called *the avoidance of a sale*, on account of some vice or defect in the thing sold, which renders it either absolutely useless, or its *use so inconvenient and imperfect* that it must be supposed that the buyer *would not have purchased* it *had he known of the vice.*"

The petition alleges that the plaintiff purchased from defendant, with full warranty against all the vices and maladies prescribed by law, four certain slaves—Moses, Leah, Hammond and Peter—for the sum of four thousand five hundred dollars : that at and before the time of the sale, they were all afflicted with various maladies or defects, whereby two (Hammond and Peter) have died, and the two remaining (Leah and Moses) have become so useless, and their ser-

vices so inconvenient and imperfect, that he would not have purchased them had he known of said vices or defects.

The petition further alleges that the defendant *knew of the vices or defects* of the slaves thus sold, and omitted to declare them; and that besides the rescission or avoidance of the sale, the restitution of the price, and *repayment of expenses*, the plaintiff was entitled to *damages*.

Judgment is prayed accordingly, for the avoidance of the sale, restitution of the price ($4,500), the *expenses* for medical attentions, and for a further sum of one thousand dollars *damages*.

The jury gave a verdict in favor of the plaintiff for the sum of seventeen hundred and fifty dollars, with interest, etc., and *that plaintiff remain the owner* of the slaves Leah and Moses (the two living at the time of filing the petition). From judgment rendered thereon plaintiff brings this writ, and assigns for error the matters of law contained in the two Bills of Exceptions.

I. The first Bill (p. 16 of Record) which we shall notice, is as follows:

Be it remembered, that on the trial of this cause before the Court and a jury, on this 5th June, 1860, the plaintiff's counsel requested the Court to instruct the jury that the tender of the slaves in controversy, if *sufficiently proved by the evidence introduced*, was *only* necessary as a pre-requisite to the rescission of the sale referred to in plaintiff's petition, and in order to enable the plaintiff to bring his suit in avoidance of said sale; and that what was required by law in reference to said tender was that it should be made *prior to the institution of the suit and its prescription by law;* that provided said tender was made prior to the institution of the suit and within the time prescribed by law for the institution of the suit, its being made *tardily* or *promptly* can have no effect to prejudice the right of plaintiff to recover in this action; that the fact, *if so found by* the jury *from the evidence introduced*, that plaintiff had tendered Peter, one of the slaves, *after his death*, does not of itself prejudice plaintiff's right to recover his value, but that said tender after the death of Peter, one of the slaves, was *unnecessary*, which charge the Court refused to make, but charged the jury "that in order to *a com-*"*plete rescission of the contract*, the tender should have been made "in a *reasonable time*, and if the jury find that it was not made in "a reasonable time, the plaintiff was only entitled to recover for *the*

"*damages* he had sustained by the slaves being defective in the "manner proved before them, and for the amount of such damages "he was entitled to recover *in this form of action.*"

To which refusal to charge, and charge of the Court, the plaintiff's counsel excepted in open Court, upon the trial of the cause and in the presence of the jury, while they were yet at the bar, upon the grounds that the tender required by law in this case is simply and solely a pre-requisite to the suit for a rescission of the sale, and that if made prior to its institution and to the prescription of the suit by law, can have no other or such relation to the merits of the controversy as is charged herein by the Court; and thereupon in open Court, the plaintiff tendered this his Bill of Exceptions, which is allowed, signed and sealed by the Court, in open Court, at the trial of the cause aforesaid, on the 5th of June, A. D. 1860.

J. A. CAMPBELL, Associate Justice of the Supreme Court, U. S.

We respectfully submit that the Court erred.

1st.—In refusing to charge as desired, that the tender of the slaves in question, is merely a *pre-requisite* to the institution of the suit for avoidance or rescission; which tender is capable of being made, and sufficient in law if made, at any time prior to its institution, and at any time prior to the prescription of the action.

2d.—In refusing to charge that, by the death of the slave Peter a tender became unnecessary in law, and that the rights of plaintiff to recover were not in any manner *prejudiced* by the simple fact of the *death* of said slave Peter.

3d.—In charging the jury that under the laws of *Louisiana* "in order to a *complete rescission* of the contract the tender should have been made in *a reasonable time*, and if not made within a reasonable time the plaintiff could only recover *damages*.

The merits of this bill are reduced to this point—Is it a well-grounded proposition in the law of Louisiana, that *two* prerequisites *concur* in the exercise of the action of redhibition, avoidance, or re-rescission, of the contract of sale. 1st. The tender prior to suit. 2d. The tender within a *reasonable time*.

We deny the latter, and respectfully submit that the law of Louisiana recognizes no "reasonable time," but the time within which the action may be brought, to wit: its statute of limitations (prescription) and that so long as the *right of action* exists the right to make the pre-requisite tender exists.

Art. 1906 (Civil Code) says: "The *effects* of being put in default "are not only that in contracts to give the thing which is the object "of the stipulation is at the risk of the person in default; but in "the cases hereinafter provided for is a *pre-requisite* to the recovery "of damages and of profits and fruits, *or to the rescission of the "contract.*"

Art. 1907. In *commutative contracts where the reciprocal obligations are to be performed at the same time, or the one immediately after the other, the party who wishes to put the other in default must at the *time* and place expressed in or *implied by the agreement,* offer or perform as the contract requires, that *which on his part was to be performed,* or the party opposite will not be legally put in default.

It is "implied by the agreement" of the vendor of slaves (his clause of warranty) that he will avoid or rescind the sale by returning the price if the slaves be subject to redhibitory vices. The commutative obligation of the vendee is, that he will return the slave, unless excused from so doing by law.

The uniform and unbroken course of decisions in Louisiana has been that the vendor, prior to the institution of the action, must be put in default (C. C. 1905): and by a tender or *offer* (C. C. 1907) to return to slave. See Hennen's Digest, p. 1074, §23; 2 N.S., 466; 4 L., 193; 19 L., 283; 9 Rob., 306; 1 An., 389; 2 do., 955; 4 do., 562; 10 do., 127; 11 do., 209.

But as regards "the *time* implied by the agreement," when the vendee must "offer or perform," we are not aware of a solitary decision in Louisiana that limits that time to some "*reasonable time*" after (what?) sale or discovery of the vices. The only limitation as to time is that contained in the following Art. 2512. "The redhibitory action must be instituted *within a year,* at the farthest, commencing from the date of the sale."

Now we submit to the Court that the proposition is almost self evident that so long as the *right of action* subsists, the power, the right, and the obligation to "offer or perform" (tender) subsists as a correlative.

The reason of the law (that he who seeks equity must do equity, Hennen's Digest, p. 1074, §23) demonstrates too plainly to need

* Defined C. C. Art. 1761.

argument that this pre-requisite of a tender is auxiliary to a right—to enable a party to carry that right into effect, not to defeat it. That it must *coëxist* with the right of action or that right of action, becomes futile and illusory.

If the law of Louisiana is silent as to any restrictions upon the "time," and contains no further provision than that it shall be a *pre-requisite* to the action (C. C., 1906–7), what authority is there to legislate into the Code limitations? limitations that are in conflict with the *reason, spirit,* and *textual* provisions of our law (C. C. 2512).

We are aware that the doctrine of the Common Law is, that to effect a *rescission* of a sale it is necessary that the tender should be made in a *reasonable time.* Vide Long on Sales, p. 238, chap. vi, of Rescinding Contracts; Towers vs. Barret, 1 Term Reports, p. 136; Fisher vs. Samuda, 1 Camp, 190 Accord; Hind vs. Whitehouse, 7 East., 571; Street vs. Blay, 2 B and A, 460; Chitty, on Contracts, p. 573–4, 499, otherwise *damages* alone is the relief given. The charge of the Court is in accordance with this doctrine.

It is due to the learned and able Judge who presided at the trial of the cause, to say that this point arose at the moment when the Court was called on to charge the jury, and that a decision of the Supreme Court of Louisiana (to which we shall presently refer) was invoked by the able and ingenious counsel (Mr. (late Justice) Spofford) opposed to us, as supporting this doctrine. Had the point been discussed at bar, as a question under the laws of Louisiana, we flatter ourselves that the well-acknowledged acumen and ability of the presiding Judge would not have failed to perceive that the decision in question does not support the Common Law doctrine.

The case relied upon is in 14 Louisiana Annual, p. 401, Lewis vs. Morgan.

Mr. Justice Buchanan, the organ of the Court, after stating the action to be a redhibitory action, and referring to the well settled doctrine that a tender is necessary before the institution of the suit, *where practicable,* proceeds to lay down certain well recognized *exceptions* to the rule, the first of which he states to be "when an actual tender is not *possible.*" It is contended (says Justice Buchanan) by appellee, that this case comes within the first of these exceptions, that defendant was an absentee from this State *when* this suit was *instituted.*

"The question (continues that learned and able Judge) upon which this case turns, is this: Was it practicable for the plaintiff at *any time* since the discovery of the redhibitory vice, and before the trial, to make a tender? The test is not the practicability of the offer of tender at the time of instituting the suit, but at *any time* since the discovery of the redhibitory vice or defect. It may be very easy for the vendee to do so during *nearly the whole period* of time previous to the institution of his action and the matter become impracticable *at the time*, but it could hardly be said that in such a case the EXCEPTION OF IMPRACTICABILITY would prevail."

We have here the substance of the point decided—that a party who relies upon the *exception* to the general rule, must bring himself clearly within its provisions, and that, like all exceptions, they are to be *strictly* construed, and not *extended*.

In the case at bar, there is no question raised below by the bill, as to whether plaintiff was *excused* from making a tender, as *impracticable;* on the contrary, it is alleged by the plaintiffs that a tender *was made*, and in the bill, that *evidence of tender* was adduced. This decision, is, therefore, inapplicable, so far as the true question of law presented in the bill is concerned, *i. e.*, whether a *tender may not be made* at any time during the year (of limitation), and before the institution of the suit.

But if the point actually decided have no bearing on this case, what remarks fell from Mr. JUSTICE BUCHANAN in his opinion, show that he does not differ with Mr. CHIEF JUSTICE MERRICK, upon the question whether a tender may *be made* at any time within the year of limitation, without regard to the consideration of its being a reasonable time.

He says, "The vendee has one year to institute the action of redhibition, and, as A CONSEQUENCE, may at any time previous to the institution MAKE A TENDER TO THE VENDOR. But if he brings his action at once and does not wait until the twelfth month is about expiring, he cannot on the trial of the case give as a reason for not alleging and proving a tender *that he has the whole year for that purpose.* The tender if it can be made must precede, if not the institution of the suit, at all events the trial."

On this point the Chief Justice, in an ably reasoned opinion, is no less clear, perspicuous and emphatic. We adopt his language for it is impossible to present the case with more cogency of reasoning

or force of language. He says (p. 404) the right to put the opposite party *in default* or to make an amicable demand exists *as long as the action exists*, which they *perfect*. In the case of *Hall vs. Lorente* it was held that a condition might be performed and a party put in default *sixteen* years after the party had acquired the right to demand a performance. 3 An. 275. The law giver has declared that the vendee shall have the right to bring his action of redhibition at any time within one year after the sale, and in some cases within one year after he has discovered the vice. C. C., 2512, 2524. Now, when the law giver has conceded the action he has conceded the right to make all demands and tenders necessary to make the action available. *Qui concedit aliquid, concedit omne sine quo, concessio est irrita.* The law giver has not said that the vendee shall have an action *if he makes a tender and demand as soon as* he discovers the vice which gives rise to his action ; but has declared *that he may bring his action at any time within the year.* The Courts cannot distinguish where the law giver has not distinguished. Where then is the text of law or the well-considered authority which adds this new condition to this otherwise clear principle of law ? I am aware of none."

Referring to Art. 2224, C. C., he says: "Here again the action continues a year after the vice has been *discovered*, and the law giver has annexed no *proviso* that that the vendee shall make a demand and tender the first opportunity or within a REASONABLE TIME. He has the entire year after the discovery to make the *demand* and bring his suit."

Agreeing as all the members of the Court do, in the leading principle that the tender may be made during the year, they differ only as to the conclusion and *deduction* therefrom. The deduction drawn by the Chief Justice differs from that of his brethren. He thus announces it. "The plaintiff had the entire year *in which to make the tender* and demand the rescission. *The defendant could not deprive him of that right by absenting himself from the State.* If the tender and demand became *impossible* by the act of the defendant his act cannot be permitted to prejudice the plaintiff's right."

In that case, say the majority of the Court, it had not become impossible—1st. Because the defendant had left an *agent* to whom the tender could have been made (p. 401). 2d. If no agent had been

left to represent defendant for *that purpose*, the alleged impossibility was a self-imposed one, and not within the exception of law.

It is to be observed that the Court directed a *non suit* to be entered thereby leaving it to plaintiff to *perfect* his right to avoid the sale, by *making a tender* instead of relying upon the *exemption* arising from a conceived impossibility.

Your Honors will perceive that the jury have refused to rescind the contract, as prayed for by plaintiff; but, on the contrary, have by their verdict expressly *affirmed* it, by saying that the plaintiff shall *remain the owner* of the slaves Leah and Moses. They give a verdict of $1750 in favor of plaintiff—and why? Their verdict must be construed in reference to the exposition of the law as laid down to them by the Court. They intended to give $1750 as *damages*, for want of a tender within *a reasonable time*. They were charged that they had power to give damages in the action. For the *want* of a tender within a reasonable time (not required of him by law), plaintiff has been deprived of the right (C. C. 2496) to have the sale rescinded, of the proper relief, and has been turned over to a relief, be it remarked, that does not exist by our laws.

In actions of *redhibition*, the *damages* authorized by our law are given in cases of *fraud* only (C. C. 2523, 2509). If the plaintiff was entitled to damages for a *fraud*, then he was entitled to a rescission of the contract; this follows from the definition of fraud (Civ. Code, art. 1841) and the art. 2496. To such an inconsistency in the verdict and judgment has a misapprehension of the law of Louisiana led to! At Common Law, probably the remedy for all injuries, with the exception of the actions of ejectment and money had and received, is the action for damages. But we submit, that under the law of Louisiana, the only *damages* that can be given on the action of *redhibition*, is for fraud.

It must be evident, then, to this Honorable Court, that as regards these directions of the Circuit Court to the jury—

1st. That although the applications for a new trial rest upon the discretion of the Court; that the evidence will be examined and the inferences which a jury would draw from it will be taken; and if justice substantially has been done (though errors have been committed), the verdict will not be disturbed; yet it is otherwise in Writs of Error: "the directions of the Court must stand or fall

"upon their intrinsic propriety, as matters of law." (1 Peters, 183. *McLanahan vs. The Universal Insurance Company.*)

2d. That even if the charge of the Court were erroneously given upon a hypothetical question not warranted by the evidence (which is not the case here as the bill set forth, that evidence was introduced to show a tender), yet if such a charge *may have had an influence upon the jury* it may be corrected on error, and the verdict set aside. 11 Wheaton, p. 59, *Etting vs. Bank of United States.*

As the suit was brought within the year of limitation, the only question the jury could consider was that to which the plaintiff in vain attempted to bring their consideration through the charge of the Court, to wit: was the suit *preceded by a tender?* Whether within a *reasonable time*, and what was a reasonable time other than *the year* fixed by law, were matters foreign to the merits; and upon which we humbly submit they were misdirected, and that such directions have had an important and all controlling influence on their verdict.

We deem it no less certain that the Court erred in refusing to charge that a tender of the slave Peter became unnecessary after *his death.*

The law compels no one to do a vain and useless thing. A tender, under such circumstances, comes clearly within the exceptions laid down in *Lewis vs. Morgan (ante).*

The fact of the "*loss of the object sold* does not, *per se*, prejudice the right of the plaintiff to recover "if that loss was not occasioned by the fault of the purchaser" (C. C. Art. 2514). As the Court charged the jury it was necessary that the tender should be made in a reasonable time, ABSOLUTELY, *dead or alive.* (See the charge embodied in the bill.)

Why is it that at common law rescissions can be only obtained when a tender has been made within a reasonable time, and that by the Civil Law it should be otherwise? Are not the *vendor's* rights equally protected under our system? We think they are by the article 2514, and the general principles of our laws, that the injury should not have happened by the fault, neglect, or want of care of vendee (Civil Code, 2294, 2514). If all the care and attention that a "prudent man" could have given was given, the loss would have happened had the object been tendered and restored to vendor's possession. He cannot, therefore, complain of any injury.

II. The remaining Bill of Exceptions (p. 15) is taken to the refusal of the judge to make the charge therein set forth.

The defendant, after filing the *general denial* filed an amended answer (p. 5).

"He avers that he requested N. Vignie, the auctioneer, who sold the slaves in question, to declare from the stand that the said slaves would have to be examined prior to their delivery by the physicians of the purchasers, and that said Vignie did so declare in a loud voice from the stand, at the time the plaintiff bought the slaves mentioned in his petition.

But respondent avers that plaintiff was in such haste to get the slaves purchased by him away that he, through his agent, Messrs. Miltenberger & Borron sent a request to respondent to have them put on board the steamer General Judson, on the 29th March, 1859, before any act of sale was passed, and hurried them off without any examination, and without complying with the terms and conditions of sale, and that if any LOSS has occurred *it has been through his own negligence and violation of the terms of sale* and IMPRUDENT CONDUCT for which this respondent is not answerable."

The Court was requested to charge that the *amended* answer or special defence was a waiver of the *general issue*, and that such amended answer was in substance a plea in *avoidance*—a plea of *discharge* from said liability, and that the whole controversy was now reduced to the simple point, has the plaintiff *discharged* the defendant in the manner and form claimed by him in his amended answer.

It has been supposed that in the Civil Law system, that the science of pleading, if it exist at all, is far from being exact, but is much *at large*. This may have been true in Rome, where several defences were permitted to a defendant (Dig. Lib., 44, tit. 1, § 5), although contradictory (*Ibid*, § 8, Corp. Jus. Canon Lib. 3, tit. 32) but that it is now, or has ever been, true, that in Louisiana contradictory and inconsistent pleas may be made, is, we think, not a question of doubt and discussion.

Three questions present themselves : 1st. What is the character and substance of the special defence presented by the amended answer ; is it inconsistent with the denial of the facts stated in the petition ? 2d. Could the facts establishing that special defence have been shown under the *general issue ?* 3d. If pleaded with the general issue, is not the plea of the general issue thereby waived ?

I. The defendant therein sets forth, that, by the contract of sale, there was a condition (not inserted in the writing), *i. e.* that the purchaser should cause the slaves to be examined by a physician before the *delivery* and completion of the contract. That this condition or *obligation* on the part of the plaintiff was violated by him, said plaintiff. That the obligation or condition was a stipulation for his (defendant's) benefit, inasmuch as it, if carried out, established at once the uncertain fact, whether there were latent redhibitory defects in the slaves sold, and whether the transaction could be consummated or not. The defendant was perhaps a broker or agent in the trans action, with no other interest than his commissions, *a fortiori* he was interested, in knowing on what foot he stood. Without this precaution, and the satisfaction of the purchaser as to the soundness of the negroes, what would have been the *possible* consequences to Hensler? The purchaser, Andrews, might have brought a suit against Hensler *after* the year of *Hensler's* purchase, but *before* the *expiration* of the *purchaser's* year of limitation; and what would have been Hensler's position as regards *his vendor*, whom he called *in warranty to defend* the suit of redhibition, said vendor being bound as an incident of the contract of sale, to warrant the objects sold from "hidden defects or redhibitory vices" (Civ. Code, art. 2451)?

Clearly this: Hensler would have found his right of action or warranty *prescribed* by the year (C. C 2512), and yet *liable* to a judgment for the price received from his purchaser.

It was to protect himself against this contingency, that Hensler inserted among the conditions of the sale, that the examination must be made by the physician of the purchuser, before delivery and consummation of the contract. It was a condition inserted for *his* benefit, if not in whole, at least, in part. No other interpretation can be put upon the contract consonant with the *intention* of this party (vendor), who dictated the conditions himself.

Now, what is the *special defence*? You, the plaintiff, have violated a special condition of your contract, whereby I have been *injured* (and how could he plead this fact as a defence to the action, except upon the ground of *injury* to him, defendant?); and as a consequence of your violation thereof and the consequent injury *to me*, you have *discharged* me from all liability, and "that if any loss has occurred, it has been through his own negligence and VIOLATION of the TERMS OF

SALE and imprudent conduct, *for which* this respondent is not ANSWERABLE."

This, we contend, is the meaning of the defendant in insisting for *his defence* to this action upon a condition and upon *facts* which establish the violation. In other words, it is a plea confessing and *avoiding*—a plea of *discharge* from all *responsibility*—from facts whereby he is not "answerable."

II. This defence was not available under the general issue. The Code of Practice, art. 323, declares, "when the defendant answers to the merits, he is not bound to answer *specially* to all the allegations contained in the petition; it is sufficient to deny *generally*, etc.; and art. 327." The defendant, though not bound to answer specially to all the allegations of the plaintiff, must nevertheless, if he intends to resist the action by means of some exception (defined C. P. 330), plead the same *expressly* and *positively* in his *answer;* otherwise, etc., etc.

The general denial, say the Supreme Court of Louisiana, in *St. Dizier vs. Wells*, 9 Annual, p. 120, "reduces the controversy between the parties to the question of the *truth* or *falsity* of the plaintiff's allegation and the *legal effects* of the facts when proved." In this case the defendant sued for a raft of timber, attempted under the general issue to set up title by a receipt in payment of the price from a third person, the ostensible owner. They add, "The rule is that a party cannot be admitted to prove what he has not alleged."

In the case at bar, it is clear, we apprehend, that the alleged violation of a condition not inserted in the bill of sale, or referred to in the petition, but declared from the stand by the auctioneer, and the consequent injury to the defendant, were not denied or put at issue by the summary form of denial of the allegations in the petition. Our learned adversary so considered it and hence the "amended answer."

III. Was the general issue waived by that special plea? It was if inconsistent therewith.

In *Nagel vs. Mignot*, 8 *Martin*, 493, which was a suit upon a *lost* instrument (note) to which the general issue was pleaded the Court say: "Is there in this case an *absolute* denial that the note sued on did ever exist? We think not. There are, to be sure, in the answer, expressions which would amount to that, if they stood alone. But the defendant pleads *specially* in a manner which destroys their force.

He first alleges that at the time when the obligation was said to be contracted he was under age and unable to contract; and further that the obligation, *if ever contracted* (which he *denies*), was without any legal consideration. Now, although independently of the general issue, the defendent may set up other means of defence to use them in case the general denial fails him, such *special* pleas must be consistent with the *general one*, not contradictory of it. In this case the defendant begins by saying that he did not execute the obligation, but by and by he says that the obligation, *if ever contracted*, was without any legal consideration. How can he know whether it was or not, unless he knows first that the obligation did exist? How can he plead want of legal consideration without admitting the existence of the note? But he first denied that the note ever existed. This mode of pleading double on facts within the knowledge of the party appears *irregular* and *illegal*, and is not in conformity with the positive provision of our statute which requires the defendant to answer without evasion. He must either deny or admit such facts. He cannot say at once that he did not, and that he did execute the act for which he is sued; *and when after having said that he did not* he discloses *in other words that he did*, HIS DENIAL OUGHT NOT TO AVAIL HIM."

The same doctrine reäffirmed in Vavasseur vs. Bayon, 11 Martin, 639; Dean vs. Jackson, 1 N. S., 127–412; 3 New Series, 75–373; 6 N. S., 226–249, and applied to pleas of payment, justification, release.

In 2 Annual, 591, *McNamara vs. Jarvis et al.*, the defendants sued as the sureties of an administrator, pleaded *general issue*, and specially that they were discharged from all *liability* in consequence of their (plaintiffs) *gross negligence* and *inattention* in enforcing their claims against the administrator. The Court hold the general issue waived by this special defence. They say "The allegation that the sureties were discharged in consequence of the gross negligence of the plaintiffs NECESSARILY ADMITS the liability of the defendant, if *negligence is not shown.* This defence is a waiver of all defects of form, and the appellant must abide by the issue he has deliberately made."

Same application more recently in 11 Annual, p. 172, *Hoffman vs. Atkins*, where the endorsor, as surety, is held to waive the general issue, and dispense with proof of notice by a special defence that plaintiff had, through his acts, caused defendant to lose his securities

on the debt. The Court says, "Such a defence implies an admission that plaintiff did have a demand against the surety (defendants)." See also 15 La, 277, Bank of Orleans vs. Whittemore.

Hensler's special defence is, that by the *negligence* of the plaintiff in error, by a violation of his obligation to him (as obligee) he has been discharged and is no longer "answerable."

It is no answer to us, to say that he pleaded *if* there was a *loss*. This hypothetical or alternative pleading is precisely what our practice does not permit. It is what the defendant attempted in *Nagel vs. Mignet*, and a form which every defendant will give to his plea who wishes to plead contradictory and inconsistent pleas. The Court say under these pleas "his denial ought not to avail him." (Ante. 8 Martin, 494.)

Nor can it be seriously contended that the defendant, in his plea, does not insist upon the condition for *his benefit*, and that its violation was an *injury* to him; but that his meaning is, that *the loss* was through the *fault* of the plaintiff, Andrews.

He no less absolutely admits by this mode of pleading, a *loss*, i. e., an injury to Andrews, and relies upon Andrews' fault *(culpa)* Civil Code, Art. 3522 §17, in discharge thereof. The petition charges the existence of redhibitory vices or defects at and before the sale—this is the *gravamen* of the action. It is the *damnum* charged to have been suffered by the plaintiff. The defendant admits the loss (damnum) but *avoids* by replying "*damnum absque injuria.*

The "*injuria,*" the fault *(culpa levis aut levissima)* is the *gist* of the defence. It was the point to which we endeavored to bring the case in the Court below on the charge sought—the refusal of which we humbly submit is sufficient ground of error.

The only defence to this action is, whether, by the law of Louisiana, such violation of the conditions discharged the defendant.

Respectfully submitted.

Pierre Soulé

# SUPREME COURT OF THE UNITED STATES.

**DECEMBER TERM—1860.**

JOSEPH ANDREWS, PLAINTIFF IN ERROR,

*vs.*

CHARLES A. HENSLER, DEFENDANT IN ERROR.

## BRIEF OF DEFENDANT'S COUNSEL.

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# SUPREME COURT OF THE UNITED STATES.

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JOSEPH ANDREWS, PLAINTIFF IN ERROR,

*vs.*

CHARLES A. HENSLER, DEFENDANT IN ERROR.

## BRIEF OF DEFENDANT'S COUNSEL.

On the trial of this redhibitory action, for the rescission of the sale of four slaves, Hammond, Moses, Peter, and Leah, made by the defendant to the plaintiff, for the sum of four thousand five hundred dollars, and a return of the purchase money, with costs and damages, on account of certain redhibitory diseases, alleged to have existed at the time of the sale, by which said slaves became utterly worthless, the plaintiff took two bills of exception to the law, as laid down by the Court in the charge to the jury.

The first of these bills we shall notice, relates to the pleadings in the cause.—(p. 15 of Rec.) The defendant, after pleading a general denial to all the allegations of the plaintiff's petition, obtained leave of the Court, and filed an amended answer, (p. 5 of R.,) with regard to which the plaintiff's coun-

sel requested the Court to charge as follows: "That this amended answer, or special defence, was a waiver of the general issue, and that such amended answer was, in substance, a plea in avoidance—a plea in discharge of said liability—and that the whole controversy was now reduced to the simple point —has the plaintiff discharged the defendant, in manner and form, as claimed by him in his amended answer?" The Court declined so to charge, and this refusal is arraigned as a cause of error in the verdict of the jury.

The plaintiff's counsel has cited numerous cases in support of his views of the law on the subject of pleading. The correctness of these decisions we do not call in question; but their applicability to the case at bar is denied.

In Louisiana, the Courts have never confined themselves with the same strictness to the laws of pleading, as in the common law States of the Union, but have permitted parties to amend their pleadings at any stage of the cause, whenever they regarded such amendments as tending to the furtherance of justice.—De Buys vs. Mollere, 2 Martin's N. S., 626. Adle vs. Mitoyer, 1 La. An., 254.

The rule, as laid down in the case of *Nagel* vs. *Minot*, (8 Martin, 493,) on the subject of general denials and special pleas, is one of universal application in this State.

The Court say: "Independently of the general denial, the defendant may set up other means of defence, to use them in case the general denial fails him. Such special pleas must be consistent with the general denial, and not contradictory to it." The defendant's amended answer fails to show any such inconsistency with his previous pleadings, as to deprive him of any benefit he might derive from them. There was no change in the point at issue, though the burden of proof may have been shifted.

The defendant's amended answer simply alleged matter showing that he had been disposed to act with the utmost fairness in the whole transaction; and that he had relinquished certain

stipulations for his security, at the special request of the plaintiff, who now sought to take advantage of this relinquishment.

The point at issue was the soundness of the slaves at the time of the sale. Now, by the laws of Louisiana, the burden of proof of this fact is thrown upon the vendor, in cases where the redhibitory maladies discover themselves within fifteen days after the sale, in slaves who have not been in the State eight months.—Rev. Stat., 1856, p. 452.

The vendor suffered the slaves to depart from his possession without an examination of their condition by the vendee's physician, at the special request and for the convenience of the vendee. The amended answer set forth this fact, and claimed that the vendee could not take advantage of his own wrong to prejudice the vendor; and that the burden of proof of their soundness, at the time of the sale, was by this act shifted on the vendee. The issue, therefore, still remained the same, and was not inconsistent with the general denial previously pleaded.

The defendant was merely availing himself of "other means of defence," and his bringing them before the Court in the form of an amended answer, cannot deprive him of the advantages of his general denial.

In the case of *McNamara* vs. *Davis*, (2 An., 591,) the inconsistency of the amended answer with the general denial is apparent. This was a suit on an administrator's bond, for failure to account for the funds of a succession. *Jarvis*, one of the defendants, pleaded a general denial, and specially, that the plaintiffs had lost their right of action, by their gross negligence and inattention in enforcing their claims against the administrator, but sought afterwards to obtain a judgment on a point not at issue—the omission of one of the sureties named in the bond to sign it. The Court say: "The plea is inconsistent with the answer, and cannot be entertained. The allegation, that the sureties were discharged, in consequence of the gross negligence of the plaintiff, admits the liability of the defendants, if

negligence is not shown. This defence is a waiver of form, and the appellant must abide by the issue he has deliberately made."

In the case of *Hoffman* vs. *Riddell*, (11 An., 172,) the defendant sought to avail himself under a general denial, of matter, which is required to be specially pleaded by Arts. 327 and 346, Code of Practice.

The remaining bill of exceptions, relating to the merits of the cause, were taken to the following portion of the charge to the jury:

"That in order to a complete rescission of the contract, the tender should have been made in a reasonable time; and if the jury find that it was not made in a reasonable time, the plaintiff was only entitled to recover for the damages he had sustained by the slaves being defective in the manner and form proved before them, and for the amount of such damages he was entitled to recover in this form of action."

The Civil Code of Louisiana prescribes the time in which actions for the rescission of the sale of slaves on account of redhibitory defects shall be brought, and limits the period to the term of one year, at furthest, from the day of sale, Civil Code, Art. 2515, but it nowhere regulates the manner nor the time in which the tender of return shall be made. The Courts have, however, decided that there must be a tender prior to the institution of the suit for the rescission of the contract.

Barrett *vs.* Bullard, 19 La. R., 281; Fisk *vs.* Proctor, 4 La. An., 562; Lewis *vs.* Morgan, 14 La. An., 401.

This equitable rule has been established as the result of the general doctrine of commutative contracts, and it opposes a barrier to fraud, concealment, and the after-thoughts of self-interest. The vendor, warned in time, may take back his property, and by superior skill and attention, preserve it; or he may have recourse on other parties, which might be lost by delay. What steps the vendor is to pursue for his own interest and protection, he is to judge, and not his vendee, and it

is but just that he should be timely apprized of the existence of redhibitory defects, that he may take these steps; and if the vendee by tardiness deprives him of these rights, he can no longer demand a rescission of the contracts.

The Roman law, whence we derive the redhibitory action, made a distinction between it and the action *quanti minoris*, not found in our code. The action for the rescission of a contract was prescribed in six months from the date of the sale, while the action *quanti minoris* could be brought at any time during the year succeeding.—*Merlin*, verbo redhibitore, 2 *Troplong* de la vente, Art., 1648.

But it is contended that as the Code allows the plaintiff a whole year within which he may bring his action, that he has the same period, because "the law-giver having conceded the action, has conceded the right to make all demands and tenders necessary to make the action available." (14 An., 404.) This doctrine is not sustained by reason nor authority, and too numerous to mention are the cases in which the law requires diligence to be exercised as a prerequisite, both in the assertion and defence of rights. In the case of *Rider* vs. *Wright & Marshall*, 10 La. An. 127, the Court decided that where the rescission of the sale of a slave was demanded nine months after the sale, on account of a redhibitory malady, which became apparent a few days after the purchase, the slave having died about that time of another disease, distinct from the one for which the rescission was sought, the plaintiff was not entitled to recover.

Though the defendants in this case were absentees, the Court did not think this made any difference, but observed that the plaintiff "should not have wanted nine months without making at least an effort to procure an amicable rescission of the sale."

In the more recent case of *Lewis* vs. *Morgan*, 14 An., 401, the Court clearly intimate that reasonable diligence in acquainting the vendor with the existence of redhibitory defects,

and of his intention to hold him responsible for a non-fulfilment of the contract, is required of the vendee to entitle him to a rescission of the sale.

The suit in this case was instituted two months after the purchase of the slave; on the trial no tender was proved; the plaintiff, however, sought to relieve himself of this prerequisite by showing that the defendants were absentees since the institution of the suit. Mr. Justice Buchanan, the organ of the Court, says on this point: "The question upon which this case turns is this: Was it practicable for the plaintiff, at any time since the discovery of the redhibitory vice and before the trial, to make the tender? The test is not the practicability of making a tender at the time of instituting the suit, but at any time since the discovery of the redhibitory vice or defect.

"It may be easy for the vendee to do so during nearly the whole period of time previous to the institution of the suit, and the matter become impracticable at the time, but it would hardly be said that in such a case the exception of impracticability would prevail. The law dispenses with a tender in such contingencies, because it requires nothing to be done in vain; and applying this principle to the case at bar, it will appear that since the discovery made by the plaintiff of the redhibitory defect of the slave purchased by him of the defendant, over two months elapsed, during which it was practicable and easy to make a tender."

This language of the Court completely upsets the doctrine that the vendee has a whole year in which he may make his tender, and conclusively shows that the tender is regarded as something more than a mere amicable demand, rather as a notification to the vendor that there has been a non-compliance with the contract, in order to enable him to adopt means for his own security and interest.

From this decision it follows, as a natural consequence, that if the vendee has not the whole period of time allowed him for bringing his suit, in which to make a tender, he is required to

use reasonable diligence in informing his vendor of the existence of the redhibitory defect. What is reasonable diligence, is a question of fact to be decided by the jury, according to the circumstance of each particular case.

The verdict rendered in this case was not in the nature of damages, but was a compensation for the loss by death of the two slaves, Peter and Hammond. The death of these two did not, however, entitle the plaintiff to a rescission of the entire contract, but only gave him a right to a return of their value.—*Merlin*, verbo Vices Redhibitoire; *Le Doux* vs. *Armor*, 4 Rob., 381; *Bertrand* vs. *Arcuiel*, 4 An., 430; *Morton* vs. *Whiletry*, 12 An., 176. These slaves were sold, "en bloc," and no specific value was attached to each. The jury estimated their value from the evidence before them, and we can see no reason for altering their verdict.

Respectfully submitted,

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